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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Re. Appln.: John R. Burgeson
Serial No.: 10/790,271
Filed: March 1, 2004
For: TEMPERATURE ACTIVATE SCENT WICK
Group Art Unit: 3762
Examiner: Christopher S. Kim
Attorney: Gerald E. Helget
Attorney Docket No.: 33075.71
Additional Fees: Charge to Deposit Account 023732

Mail Stop Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

TRANSMITTAL COVER LETTER

Sir:

Enclosed for filing are the following:

1. Reply to Examiner's Answer
2. Post card receipt

The Director is authorized to charge any fee required by this Response to Deposit Account No. 02-3732.

Respectfully submitted,

Dated: 10-2-06

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CERTIFICATE OF FACSIMILE TRANSMISSION

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By Gerald E. Helget
Date 2 Oct 06



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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Examiner: Christopher S. Kim
Art Unit: 3762
Confirmation No.: 9536
Attorney: Gerald E. Helget
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Alexandria, VA 22313-1450

REPLY TO EXAMINER'S ANSWER

Sir:

Appellant, by his attorney, submits this Reply to the Examiner's Answer mailed August 1, 2006.

CERTIFICATE OF MAILING

I hereby certify that this document is being deposited with the United States Postal Service as First Class Mail, in an envelope addressed to: Mail Stop Appeal Brief-Patents, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, on the date indicated below.

By *Gerald E. Helget*
Date 10-2-06

ARGUMENT

A. The Examiner has withdrawn the rejection of claims 1, 2, 4, 5, and 8-12 under 35 USC 102(b) as being anticipated by Fuld.

B. Claims 1, 2,4,5 and 8-12 are not anticipated by Bundy.

Reply to Examiner

Claim 1

1) The Examiner has answered that

Bundy discloses a temperature activated scent wick comprising a container D made of substantially rigid material (col. 3, lines 46-50: flexible plastic material such as polyethylene; container D is substantially rigid to the extent it retains its shape and flexes only when squeezed by hand, i.e., a squeeze bottle; appellant himself discloses, in his specification, on page 5, line 12, that his substantially rigid container 12 is a glass or plastic bottle) so as to resist atmospheric pressure...

In addition to the citation to Appellant's specification (page 5, line 12), Appellant directs the Board to page 6, line 29 ff, which states:

It can be seen that container 12 must be rigid so as to resist an atmospheric pressure effects that can tend to distort the interior volume thereof and thereby detract from the proper operation of the present invention.

While claim 1 requires the container to be "made of substantially rigid material", the claim also requires this substantially rigid material to "resist atmospheric pressure affects."

One of ordinary skill in the art would look to the specification at page 5, line 12 in order to understand what the inventor, as his own lexicographer, intended "rigid" and "so as to resist atmospheric pressure affects" to mean. It is clear from this section of the specification that the inventor excludes containers that can be distorted by atmospheric pressure so as to affect the interior volume.

This can be easily understood by the equation for the ideal gas law $PV=nRT$ (cited by the Examiner at page 12 of his answer. This can be transcribed to be: $V=nRT/P$. In order for the claimed invention to have a "temperature buffering scent reservoir", the volume of air within the container must be directly related to the ambient temperature. As ambient temperature increases, the volume of air within the container will increase, forcing scent out of the container as described in the specification. However, if atmospheric pressure can affect the interior volume of the container, then the invention will not work properly. For example, if atmospheric pressure increases, this will counteract the increase in volume caused by a rise

in ambient temperature unless the container is substantially rigid so as to resist such atmospheric pressure effects (volume is inversely related to pressure).

Bundy does not describe the container D as being substantially rigid. To the contrary, Bundy describes the container as being made of “a flexible plastic material such as polyethylene” (col. 3 lines 47-48). Bundy also describes the operation of the apparatus at col. 3 lines 50-57, as follows:

With such a bottle or container D, it will be apparent that when the opening 33 of the nozzle E is of such size as it will not normally allow for free flow of the deodorant liquid therethrough, the liquid can be forced through the nozzle, through the port 21 in the element C, and into the filler B, in the case A, by squeezing or otherwise applying pressure onto and collapsing the container.

It is thus apparent that the container D of Bundy is not substantially rigid so as to resist atmospheric pressure effects, and would in fact be inoperative as a temperature buffering scent reservoir, since any change in atmospheric pressure could counteract the effect of temperature.

It is also apparent that the Examiner’s statement that the container of Bundy “is substantially rigid to the extent it retains its shape and flexes only when squeezed by hand” is incorrect. The above citation from Bundy states that the liquid can be forced out of the container by squeezing or otherwise applying pressure onto and collapsing the container. Thus, atmospheric pressure would also force liquid out of Bundy’s container, and the apparatus of Bundy would be inoperative as a temperature buffering scent reservoir.

2) The Examiner has also answered that Bundy discloses:

An absorbent wick B securable about (interpreted as: in the vicinity of) the temperature buffering scent reservoir exterior release end...

Appellant replies that the Examiner’s construction of “securable about” is unreasonably broad. Appellant’s specification (page 5, line 27) states that

scent wick 45 essentially covers scent releasing outface 36 and reservoir portion 24 and is releasable held in place by Velcro hooks 47.

Reading the claim in the light of this description in the specification makes it clear that “securable about” does not include the absorbent scent wick B of Bundy, which is located below and unattached to the outlet end of opening 33.

3) The Examiner has also answered that

...the pressure increase and decrease inside the container D associated with temperature increase and decrease as a result of the present or absence of the sun would inherently result in Bundy performing appellant's wherein clause.

As discussed above, this is incorrect. Because the container D is not substantially rigid, there is no inherent result in pressure increasing inside the container D with temperature increase, because this effect can be countered by a decrease in atmospheric pressure, as described above.

MPEP 2112 states:

"To establish inherency, the extrinsic evidence 'must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient.'" *In re Robertson*, 169 F.3d 743, 745, 49 USPQ2d 1949, 1950-51 (Fed. Cir. 1999)

"In relying upon the theory of inherency, the examiner must provide a basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristic necessarily flows from the teachings of the applied prior art." *Ex parte Levy*, 17 USPQ2d 1461, 1464 (Bd. Pat. App. & Inter. 1990) (emphasis in original)

The Examiner has not met this burden.

Claim 8

The same counter-arguments applied to claim 1 above are also applicable to claim 8.

Claim 10

Bundy does not disclose:

the decrease in ambient temperature will draw the scent from the tube and housing with air back into the container.

Again, because the container of Bundy is not substantially rigid, this effect is not disclosed. A concomitant decrease in atmospheric pressure would counter-act the decrease in ambient temperature.

Claim 11

The same counter-arguments applied to claim 1 above are also applicable to claim 11.

C. Claims 1, 2,4,5 and 8-12 are not anticipated by Ohayon.

Claim 1

1) The Examiner refers to col. 7 line 55 through col. 8 line 11 as showing a container that resists atmospheric effects.

The cited material is as follows:

...Pressure may be increased in a reservoir (30) made from a semi-rigid material by squeezing the same, when the release of some of the contents (100) will equalise the pressure inside the reservoir (30) relative to external ambient atmospheric pressure. The reservoir walls are preferably made from a sufficiently pliant and flexible material, so that when the “squeezing action” is terminate, the reservoir assumes its original shape.

The semi-rigid material of Ohayon clearly does not resist atmospheric effects, but operates by the container being squeezed to release the contents, as above in Bundy.

If the reservoir (30) is made from a rigid material, pressure therein may be increased by a number of different ways known in the art including, e.g., a pump mechanism. Alternatively, the reservoir cap (32) may be made from a flexible material, such as a rubber bulb (32x) for example, and a squeezing action on the same reduces the volume inside the reservoir thereby increasing the pressure therein, and leading to the dispensation of the said liquid contents.

There is no disclosure here of a reservoir being temperature-buffered, but again a mechanical effect on the container such as squeezing is disclosed. The above citations are the only ways disclosed in Ohayon of increasing the pressure inside the reservoir (30).

2) The Examiner has also answered that Ohayon discloses:

An absorbent wick 40 securable about **(interpreted as: in the vicinity of)** the temperature buffering scent reservoir exterior release end...

Appellant replies that the Examiner’s construction of “securable about” is unreasonably broad. Appellant’s specification (page 5, line 27) states that

scent wick 45 essentially covers scent releasing outface 36 and reservoir portion 24 and is releasable held in place by Velcro hooks 47.

Reading the claim in the light of this description in the specification makes it clear that “securable about” does not include the absorbent scent wick 40 of Ohayon, which is located below and unattached to the outlet end of opening 38.

Claim 8

The same counter-arguments applied to claim 1 above are also applicable to claim 8.

Claim 10

Ohayon does not disclose:

the decrease in ambient temperature will draw the scent from the tube and housing with air back into the container.

In the case where the reservoir of Ohayon is not rigid, this effect is not operational. A concomitant decrease in atmospheric pressure would counter-act the decrease in ambient temperature. Ohayon only discloses air being sucked back into the reservoir when the squeezing action is terminated. Col. 7 line 64 to Col. 8 line 3. Ohayon does not disclose this effect at all if the reservoir is rigid.


Claim 11

The same counter-arguments applied to claim 1 above are also applicable to claim 11.

In view of the foregoing, Appellant asks the Board to overturn the Examiner's rejections and allow all claims.

Respectfully submitted,

Dated: 10-2-06

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